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FOR the past dozen years, the Supreme Court of the United States has been increasingly preoccupied with drawing a line between the first amendment right of free expression and the right of society to control obscenity. Each of the famous cases in this area—including *Roth v. United States*,[1] *Jacobellis v. Ohio*,[2] *Ginzburg v. United States*,[3] and *The Fanny Hill Case*[4]—has made the Court's efforts more difficult by adding new guidelines instead of clarifying old ones. The result: the Supreme Court, as Justice Jackson predicted in 1948, has indeed become the "High Court of Obscenity."[5]

In the spring of 1967, however, the Court indicated in *Redrup v. New York*[6] that it is trying to extricate itself from the judicial thicket these decisions have created. Thus, *Redrup* may be the most important obscenity decision since the 1957 landmark of *Roth v. United States*.[7] This assertion may puzzle some attorneys because the *Redrup* decision, while receiving front-page coverage in the *New York Times*[8] and the *Washington Post*[9] when first announced, has received little subsequent publicity in the news media and virtually no attention in law journals.[10] The opinion does not look important; it was a per curiam

† 386 U.S. 767 (1967) (per curiam).

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1. 354 U.S. 476 (1957).
2. 378 U.S. 184 (1964).
3. 383 U.S. 463 (1966).
4. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966) [hereinafter referred to as The *Fanny Hill* Case or *Fanny Hill*].
5. *See* Lewis, *Sex and the Supreme Court*, ESQUIRE, June, 1963, at 82.
6. 386 U.S. 767 (1967).
7. 354 U.S. 476 (1957).
8. See note 10 *infra*.
9. *Id.*
10. *Redrup* was mentioned in at least two law journals through October 1968.

decision so short that it now takes up only three pages in the Supreme Court Reporter, including a one-page dissent by Justice Harlan and the now-retired Justice Clark. *Redrup* may have appeared as just another obscenity case, one of many before the Court in the last few years.[11]

Although ignored by the law journals, *Redrup* has been used vigorously by justices and judges. As of March, 1969, *Redrup* had been cited as controlling or as a key factor in the reversal of 35 state and federal obscenity convictions.[12] At this point, the case could mean at least two things. First, where content of publications charged to be obscene is in question, federal and state prosecutions will not be successful unless it can be shown that the material involved is what Justice Stewart calls hard-core pornography.[13] Second, it seems that the Supreme Court has decided that the time has come to begin putting men, not books or motion pictures, on trial. Consequently, the *Redrup* case and its offspring are placing greater emphasis on the conduct of a defendant rather than the color of the material he has distributed.[14]

The purpose of this article is to discuss briefly the rather confusing tangle of obscenity cases prior to *Redrup*, and then to describe the Supreme Court's use of the *Redrup* language to redefine and clarify this area of the law.

The Background For Redrup: Roth (1957) Through Ginzburg (1966)

Before analyzing *Redrup* in detail, it is necessary to consider some of the key tests or standards for determining obscenity used by the Supreme Court during the decade before *Redrup*. First, of course, was that acknowledged landmark in the American law of obscenity, the 1957 decision in *Roth v. United States*.[15] Here, the Court for the first time

See Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302, 303 n.4 (1967); Sutter, *Separate Obscenity Standard for Youth: Potential Court Escape Route from its "Supercensor" Role*, 1 GA. L. REV. 707, 730 n.151 (1967). Unfortunately, both authors misread the *Redrup* decision, the former arguing that the convictions were reversed on the basis of the *Roth* standard, the latter contending that procedural grounds were used to justify the reversal. For news coverage of *Redrup*, see N.Y. Times, May 9, 1967, at 1, col. 1; Washington Post, May 9, 1967, at 1, col. 1.

11. *See, e.g.*, 388 U.S. 439-54 (1967) where some 14 per curiam decisions, all dealing with obscenity and all decided June 12, may be found.

12. *See* cases cited notes 95-97 *infra*.

13. This argument has been advanced by at least one judge. State v. J.L. Marshall News Co., 13 Ohio Misc. 60, 61, 232 N.E.2d 435, 436 (C.P. 1967).

14. *See* cases cited notes 95-97 *infra*.

15. 354 U.S. 476 (1957).

directly ruled that obscenity laws are constitutional exercises of government's police power. In language that was to become important in later cases, Justice Brennan wrote for the Court:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of free speech and press], unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[16]

In 1957, the phrase "redeeming social importance," which was to be used to protect literature in subsequent obscenity decisions, was merely dictum.[17] The test for determining obscenity in the *Roth* case was

> whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[18]

Although *Roth* remains an important decision in the law of obscenity, if not the most important, later decisions by the Supreme Court have shown that it settled little. In 1962, five years after *Roth*, the case of *Manual Enterprises v. Day*[19] brought before the Court magazines which Justice Harlan termed "dismally unpleasant, uncouth and tawdry,"[20] and which were published "primarily, if not exclusively, for homosexuals."[21] Even so, with Harlan announcing the judgment, a majority of the Court ruled that magazines such as *Manual*, *Trim*, and *Grecian Pictorial* were not obscene and unmailable because they were not "patently offensive." Harlan wrote:

> These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as "patent offensiveness" or "indecency." Lacking that quality, the magazines cannot be deemed legally "obscene" . . . .
>
> . . . .
>
> Obscenity under the federal statute . . . requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under § 1461 [of Title 18 of the United States Code]. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal. It is only in the

16. *Id.* at 484.
17. *Id.*
18. *Id.* at 489.
19. 370 U.S. 478 (1962).
20. *Id.* at 490.
21. *Id.* at 481.

> unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive.[22]

Harlan reiterated the long-held Supreme Court position that nudity, by itself, was not obscene.[23] The major element added by the *Manual* decision was the qualification that to be obscene, material has to be "patently offensive."

The tricky phrase "contemporary community standards," first used in *Roth*,[24] cropped up again in 1964 in *Jacobellis v. Ohio*.[25] Announcing the judgment of the Court, Justice Brennan ruled that the French film *Les Amants* was not obscene. He declared that constitutional questions of obscenity should not be decided on the basis of the standards of a particular community where a case arose; instead said Brennan, no " 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution."[26] Brennan added:

> The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines" . . . . [W]e see even less justification for allowing such limits to vary with town or county lines. We thus affirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.[27]

Despite these words, no truly "national standard" or test for judging obscenity has ever been agreed to by a majority of the Court. In *Jacobellis*, only two Justices, Brennan[28] and Goldberg,[29] explicitly stated that there should be such a "national standard." Three other Justices who agreed with the Court's judgment in favor of Jacobellis based their decision upon different grounds.[30]

Then, on March 21, 1966, the Court announced decisions in three obscenity cases: *The Fanny Hill Case*,[31] *Mishkin v. New York*,[32]

22. *Id.* at 486.
23. *Id.* at 490.
24. See text at note 18 *supra*.
25. 378 U.S. 184 (1964).
26. *Id.* at 193.
27. *Id.* at 194-95 (citations omitted).
28. *Id.* at 195. Justice White concurred in the judgment but wrote no opinion.
29. *Id.* at 198.
30. *Id.* at 196 (Black & Douglas, JJ.); *id.* at 197 (Stewart, J.).
31. 383 U.S. 413 (1966).
32. 383 U.S. 502 (1966).

and *Ginzburg v. United States.*[33] *Fanny Hill,* also known as *The Memoirs of a Woman of Pleasure,* was written in England about 1749 by John Cleland. First published in the United States about 1800, this book also seems to have been the first in America to have become the subject of an obscenity trial—during 1821, in Massachusetts.[34] More than 140 years later, the Supreme Court, through Justice Brennan, held that this frankly erotic novel could not be found obscene because it was not "utterly without redeeming social value."[35] Brennan, summing up the Supreme Court's approved test for obscenity up to 1966, attempted to reconcile the various standards into this listing:

> We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" . . . . Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[36]

Justice Brennan also wrote the majority opinion in *Mishkin v. New York.*[37] Edward Mishkin, operator of a bookshop near New York City's Times Square, had been convicted for publishing more than 50 paperbacks specializing in sadism and masochism. With not a little sophistry, Mishkin's attorneys argued that since most people would be nauseated rather than titillated by such books, these materials were not obscene because they did not appeal to the prurient interest of an average person. Brennan neatly sidestepped this challenge in his majority opinion, declaring that the Court adjusts "the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of sexual interests of its . . . recipient group . . . ."[38]

Finally, Brennan announced the Court's decision in the case involving Ralph Ginzburg, publisher of the hardcover magazine *Eros* and the book entitled *The Housewife's Handbook on Selective Promiscuity.*[39] Ginzburg argued in his appeal that his publications were not obscene under the Supreme Court's definitions of the term. Brennan

33. 383 U.S. 463 (1966).
34. Commonwealth v. Holmes, 17 Mass. 335 (1821).
35. *See* 383 U.S. at 419-20.
36. *Id.* at 418.
37. 383 U.S. 502 (1966).
38. *Id.* at 509.
39. Ginzburg v. United States, 383 U.S. 463 (1966).

neither agreed or disagreed, but merely said that in this case Ginzburg's advertising was more important than his books, since, in his ads, Ginzburg had implied that the material was obscene. There was abundant evidence, Brennan said, "that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering —'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' "[40] Pandering has been popularly defined as printing a provocative cover, advertising prior banning, displaying the item massed with other borderline items, or in various ways urging erotic, deviant, or scatological appeal.[41] Brennan noted that Ginzburg had attempted to get mailing privileges for his advertising circulars from the villages of Blue Ball and Intercourse, Pa., and finally mailed them from Middlesex, N.J.[42] Brennan said that conduct such as this indicated "pandering." In other words, it didn't really matter whether the Supreme Court believed the publications to be obscene; it was enough that Ginzburg believed them to be obscene and demonstrated this through his advertising campaign.[43]

The majority opinion was challenged by several heated dissents. Justice Black, who had often argued that freedom of expression should be absolute, declared that Ginzburg had been sentenced to serve five years in prison for "distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal."[44] Justice Harlan contended that the Court's majority had rewritten the federal obscenity statute in order to convict Ginzburg.[45] From the standpoint of *Redrup*, however, the most important dissent came from Justice Stewart, who noted that "Ginzburg was not charged with 'commercial exploitation'; he was not charged with 'pandering'; he was not charged with 'titillation.' "[46] Stewart said that the first amendment has made restriction of printed material the exception rather than the rule; and in his view, there was only one class of material that might be constitutionally suppressed—what he called hard-core pornography. He borrowed language from a brief prepared by Thurgood Marshall, then Solicitor General of the United States, for his definition of hard-core pornography. It included

> photographs, both still and motion picture, with no pretense of

40. *Id.* at 467.
41. F. KUH, FOOLISH FIGLEAVES? 78 (1967).
42. 383 U.S. at 467-68.
43. *Id.* at 470-71.
44. *Id.* at 476.
45. *Id.* at 494.
46. *Id.* at 500.

> artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value.[47]

Ginzburg's publications did not fall into the category of hard-core pornography, Stewart said, and therefore could not be constitutionally suppressed.

These cases—*Roth, Manual, Jacobellis, Fanny Hill, Mishkin,* and *Ginzburg*—were all important parts of the background for *Redrup v. New York.*

The Redrup Decision

Important legal principles sometimes arrive in curious packages, and the *Redrup* case had few of the earmarks of a landmark decision. Although cited simply as *Redrup v. New York,* this decision actually resulted from the Court's simultaneous consideration of three state cases; the one from New York[48] and two others, *Austin v. Kentucky,*[49] and *Gent v. Arkansas,*[50] each dealing with sexy paperback novels and with what are called in the vernacular, "girlie magazines."

In *Redrup,* a plainclothes policeman had purchased paperbacks entitled *Lust Pool* and *Shame Agent* from Robert Redrup, a clerk in a New York City newstand. As a result of this sale, Redrup was convicted of violating a New York state criminal law;[51] his conviction was affirmed on appeal; and the Supreme Court granted certiorari.[52] In *Austin,* a woman specifically asked for, and purchased, the publications *High Heels* and *Spree* from a salesgirl in William L. Austin's newsstand in Paducah, Kentucky. Because of this sale, Austin was subsequently convicted of violating a Kentucky obscenity statute.[53] The Court of Appeals of Kentucky overruled Austin's motion for appeal

47. *Id.* at 499 n.3.

48. (N.Y. App. T. 1965) (unpublished decision), *cert. granted,* 384 U.S. 916 (1966).

49. 386 S.W.2d 270 (Ky. 1965), *cert. granted,* 384 U.S. 916 (1966).

50. 239 Ark. 474, 393 S.W.2d 219 (1965), *prob. juris. noted,* 384 U.S. 937 (1966).

51. 3 N.Y. Sess. Laws 1881, ch. 676, § 317, at 77-78, *as amended,* 2 N.Y. Sess. Laws 1900, ch. 731, § 1, at 1576 (repealed 1967) (corresponds to N.Y. PENAL LAW §§ 235.05, 235.10(2) (McKinney 1967)).

52. 384 U.S. 916 (1966).

53. [1962] Ky. Acts, ch. 273, §§ 1-4, at 945-46 (repealed 1968).

and the Supreme Court of the United States granted certiorari.[54] In *Gent v. Arkansas*, the prosecuting attorney for the Eleventh Judicial District of that state brought a civil proceeding to have certain issues of some "girlie magazines" declared obscene. Distribution of these publications was to be enjoined and the magazines were to be surrendered and destroyed under Arkansas law.[55] The Supreme Court of Arkansas ultimately affirmed judgments against the magazines involved and the Supreme Court noted probable jurisdiction.[56]

When granting certiorari in *Redrup* and *Austin*, and noting probable jurisdiction in *Gent*, the Court carefully narrowed the issues to be considered in each case. In *Redrup* and *Austin*, the Court agreed to consider only whether the state must prove that the defendants had knowledge of the character of the contents of the publications before a conviction could be sustained.[57] In *Gent*, the questions that the Court said it would hear on appeal included whether the Arkansas statute was an unconstitutional prior restraint on expression and whether the statute was unconstitutionally vague.[58] In all three cases, the Court had assumed that the material in question was "obscene in the constitutional sense";[59] but, as the unidentified Justice wrote in the *Redrup* majority opinion (the suspicion arises that the opinion may have been delivered unsigned out of a profound sense of embarrassment), "we have concluded that the hypothesis upon which the Court originally proceeded was invalid. . . ."[60] In other words, the material was not obscene in the constitutional sense.

Here *Redrup* began to cover new ground in the never-never land of obscenity law. The majority opinion listed a number of previously used standards of the Court for judging obscenity. Two Justices, evidently Black and Douglas, "have consistently adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their 'obscenity' ";[61] while a third Justice, apparently Stewart, was characterized as being of the opinion that a state's power to punish obscenity is

54. 384 U.S. 916 (1966).

55. ARK. STAT. ANN. §§ 41-2713 to -2728 (1964).

56. 384 U.S. 937 (1966).

57. 384 U.S. 916 (1966). The Court limited its consideration to the specific scienter requirements announced in Smith v. California, 361 U.S. 147 (1959), where the Court had held that a defendant criminally charged with purveying obscene material must be shown to have had some knowledge of the character of the material. *Id.* at 154.

58. 384 U.S. 937 (1966).

59. 386 U.S. at 769.

60. *Id.* at 770.

61. *Id.*

"narrowly limited to a distinct and clearly identifiable class of material . . . ."—the so-called hard-core pornography test noted previously.[62] The unidentified author of the opinion then stated that other Justices, probably Warren, Fortas and Brennan, agreed to a standard quite close to that suggested by Stewart;[63] and finally, he noted that "another Justice," evidently White, "has not viewed the 'social value' element as an independent factor in the judgment of obscenity."[64]

After listing all of these tests for judging obscenity, the Court seemed to virtually throw up its hands in defeat, declaring: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments [convicting Redrup, Austin and *Gent*] cannot stand. Accordingly, the judgment in each case is reversed."[65]

The inclusion of Justice Stewart's yardstick concerning hard-core pornography may be especially significant; at least one lower-state-court judge has ruled that the central meaning of *Redrup* is found in Stewart's definition. Ohio Judge Bettman stated in December of 1967 that the Stewart standard has been absorbed into the Supreme Court's standard of obscenity; and that from now on, only hard-core pornography can be proscribed.[66] Under this new test, according to Bettman, "any ordinary book or magazine seller . . . is constitutionally protected against prosecution for material, other than hard-core pornography . . . ."[67] He suggested that by taking this step, "the Court has made clear it is determined to close once and for all the Pandora's box it opened in *Roth v. United States* . . . which required all the courts in the country to act as constitutional literary censors."[68] Only time will tell whether Judge Bettman has correctly read the central meaning of *Redrup*; but if he is correct, the Supreme Court has gone a long way toward simplifying the task of judging allegedly obscene content.

However, *Redrup* dealt not only with content, but also with conduct of persons who distribute material suspected of being obscene. In its approach to conduct, the cryptic *Redrup* opinion gave a broad hint of enlarging a policy started in *Ginzburg*, in which the Court held that the manner in which books or magazines were marketed

62. *Id.* See text at note 45 *supra.*
63. *Id.* at 770-71.
64. *Id.* at 771.
65. *Id.*
66. State v. J.L. Marshall News Co., 13 Ohio Misc. 60, 62, 232 N.E.2d 435, 436 (C.P. 1967).
67. *Id.* at 61, 232 N.E.2d at 437.
68. *Id.* at 61, 232 N.E.2d at 436.

would be taken heavily into consideration in ruling whether books or magazines were obscene. The *Ginzburg* decision suggested that if the publisher advertises or markets his material with great emphasis on the sexually provocative aspects of his publication, such emphasis might be decisive in the Court's determination of the question of obscenity; if a publisher claims his books are obscene, courts may take his claims at face value and find him guilty of violating obscenity laws.[69]

In *Redrup*, the Court appeared to be extending its *Ginzburg* decision to include both methods of distribution and a consideration of the kinds of person to whom the material might be offered. The opinion listed three categories of marketing that might cause the distribution of otherwise protected material to become a criminal act: (a) The sale of sexually titillating materials to juveniles; (b) the distribution of such materials in a manner that is an assault upon individual privacy because it is impossible for an unwilling recipient to avoid exposure to it; and (c) sales made in a "pandering" fashion under circumstances similar to those which caused the Court to uphold the obscenity conviction of Ralph Ginzburg in 1966.[70]

While there is always a danger of reading more into a decision than is really there, it is reasonable to infer from the decision that the Supreme Court is adopting a "standards of conduct" test. A standard of conduct, such as whether or not the distribution constituted an assault on individual privacy, is much more susceptible to traditional tests of evidence than abstract "standards of obscenity" advanced by the Court in cases such as *Roth* and *Fanny Hill*. It would be comparatively simple, for example, for a prosecutor to introduce evidence to show that allegedly obscene posters were pasted on a billboard alongside the main thoroughfare into town. Testing the standard of conduct involved in displaying the posters seems far simpler than wading into the problems that attend determining whether the posters possess any "redeeming social value" or whether they go beyond customary limits of candor in a contemporary community.[71]

The three standards of conduct were merely listed in *Redrup*, with little illumination provided other than that offered by bare citations of decisions; analysis of the supporting cases cited in *Redrup*, however, may provide some additional insights into the standards of conduct sought by the Court.

69. *See* 383 U.S. 463, 469-71.
70. 386 U.S. at 769.
71. *See generally* The *Fanny Hill* Case, 383 U.S. 413 (1966).

Sales to Juveniles

In 1957, the United States Supreme Court struck down a Michigan statute on first amendment grounds because it listed as obscene any thing which might corrupt the morals of youth;[72] if strictly enforced, it would limit adults to reading only those things which were fit for children.[73] While the Court suggested in *Redrup* that statutes which reflect a "specific and limited state concern for juveniles" might be safe from constitutional attack, they should not be designed to limit what all citizens might read, but only what children might read.[74] This suggestion of a standard that could deal specifically with juveniles was soon put to use by the Court in *Ginsberg v. New York.*[75] There, the Court upheld the obscenity conviction of Sam Ginsberg for selling two "girlie" magazines to a 16-year-old boy in violation of a New York statute forbidding sale of certain kinds of materials to children under the age of 17,[76] the same type of material that had been declared *not* obscene in the *Redrup* case. In affirming Ginsberg's conviction, Justice Brennan accepted the concept of "variable obscenity"—that is, under the terms of the New York statute, the state could punish the act of selling certain magazines to individuals under 17 years of age; sale of the same magazines to individuals 17 and over, however, was not criminal.[77]

On the same day that it upheld Ginsberg's conviction, the Court struck down a Dallas, Texas, film censorship ordinance[78] which provided for a board to review films and classify them as being suitable or not suitable for young persons.[79] The Court ruled that the statutory standard—describing or portraying sexual promiscuity—could not be a constitutionally adequate guide, since it provided no narrowly drawn, definite criterion for the board to follow.[80] It is apparent, therefore, that while the Court seems willing to allow the states to discriminate between what is obscene for juveniles and what is obscene for adults, it nevertheless will insist that such legislation adopt reasonably precise standards so that those administering it are governed by an objective guide.[81]

72. Butler v. Michigan, 352 U.S. 380 (1957).
73. *Id.* at 383.
74. *See* 386 U.S. at 769.
75. 390 U.S. 629 (1968).
76. N.Y. PENAL LAW § 484-h (McKinney 1967).
77. 390 U.S. at 635-36.
78. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968).
79. DALLAS, TEX. REV. CODE OF CIVIL & CRIM. ORDINANCES § 46A (1960).
80. *See* 390 U.S. at 689-90.
81. *See id.* at 689, *quoting* People v. Kahan, 15 N.Y.2d 304, 313, 206 N.E.2d 330, 335, 258 N.Y.S.2d 386, 393 (1965) (Fuld, J., concurring).

Obscenity and Privacy

The next standard of conduct outlined in *Redrup* involved a vague concept of privacy. The Court suggested that if material was presented so that it was impossible for an individual to avoid exposure to it, such material might lose the protection of the first amendment.[82] It did not elaborate on this standard, citing only two privacy-related, nonobscenity cases in its opinion: *Breard v. Alexandria*,[83] which involved prosecution of door-to-door magazine salesmen under a municipal ordinance, and *Public Utilities Commission v. Pollak*,[84] which concerned the legality of the use of radio receivers in privately owned, but municipally franchised, buses and streetcars. In *Breard*, the Court said that the ordinance regulating door-to-door sales was designed to protect the "living rights of others to privacy and repose" and did not infringe upon freedom of the press.[85] In *Pollak*, the Court declared that the Constitution does not secure a right of privacy to each bus passenger equal to his right of privacy enjoyed at home. Consequently, the use of radio receivers was consistent with the public convenience, comfort, and safety of passengers.[86]

Neither the *Breard* nor the *Pollak* cases, however, are really relevant to the kind of conduct that the Supreme Court condemns in *Redrup*. One suspects that bawdy movie posters in front of a theater on a public street, unsolicited sexy literature that arrives in the mail, or the blaring amplification of "party" songs over loudspeakers are the kinds of privacy-invading conduct that the Court had in mind in *Redrup*. Such a principle might be applied to proscribe the use of shocking words or pictures in a widely circulated publication such as a daily newspaper or family magazine where such material is not customarily found. This kind of conduct, it may be surmised, might remove constitutional protection from sexually uninhibited, but otherwise constitutionally protected material.[87] It should be emphasized, however, that

82. *See id.* at 681-83.

83. 341 U.S. 622 (1951).

84. 343 U.S. 451 (1952).

85. 341 U.S. at 625-26, 645.

86. 343 U.S. at 464-65.

87. Recently the importance of the privacy aspect of the *Redrup* decision has been emphasized if not clarified by the so-called "obscene films" case, Stanley v. Georgia, 394 U.S. 557 (1969). In *Stanley* the Supreme Court ruled that mere private possession of obscene materials, in the absence of an intent to sell or circulate, is not punishable criminal behavior. Justice Harlan said that "[i]f the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or films he may watch." *Id.* at 565. This is, in a sense, the converse of the *Redrup* idea that blatant imposition of such

the Supreme Court has never used the specific standard in question in gauging the conduct of a defendant in an obscenity case, nor can such a test be found in other reported federal or state decisions.

Pandering Sales

Finally, the Court in *Redrup* reiterated its condemnation of sales of material made in a pandering fashion, a denunciation first made explicit in *Ginzburg* in 1966, but which had been hinted at in the *Roth* case of 1957.[88] As noted above,[89] Justice Brennan in *Ginzburg* said that although publications which were involved in obscenity prosecutions might not be obscene in themselves, convictions could be sustained if there was evidence of the defendant's pandering in efforts to sell the publications. The Court's reemphasis of pandering, along with its concern about sales to juveniles and distribution which invades privacy, adds up to a significant shift in emphasis. In sum, the Court seems to be groping for a "standard of conduct." While perhaps not as permissive as the enlarged "standard of obscenity" that has blossomed since *Roth*, the "standard of conduct" idea nevertheless seems more viable, more susceptible to physical proof, and may offer clearer guidelines to publishers or film distributors.

The question must be raised, however, whether a part of the freedom to publish and to read should be sacrificed in the interest of clearer guidelines and more workable standards. Although *Redrup* has been used to reverse obscenity convictions, it contains a monumental internal inconsistency that may someday be used to justify obscenity convictions, not overturn them. On the one hand, the majority opinion in *Redrup* seems to suggest that only hard-core pornography, quite rigorously defined, can be suppressed;[90] but on the other hand, conduct of the seller or distributor can somehow alter content, can somehow make "good" books "bad." Thus the stringent definition of "hard-core pornography" advanced by Justice Stewart could be little protection for a distribution of material that was seen by a court to be an invasion of privacy, a sale to a minor, or a "pandering" sale. Conduct may indeed be easier to judge than content; but such a system, as Justice Douglas pointed out in his dissent to the *Ginzburg*[91] and *Mish-*

materials upon persons, invading their privacy, is outside the range of permissible conduct.

88. *See* 354 U.S. 476, 495 (1957) (Warren, C.J.) (concurring opinion).

89. See text at notes 40-43 *supra.*

90. *See* 386 U.S. at 770-71.

91. 383 U.S. 463, 482 (1966).

kin[92] cases, could contain real dangers to freedom of the press:

> A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection than does their unostentatious inclusion in the average edition of the Bible.[93]

The Impact of Redrup

Although at first glance *Redrup* might appear noteworthy only for its ambiguity, it is nonetheless a decision to be reckoned with because of its impact on recent obscenity cases. In little more than a year and a half the case has been cited either as controlling or as a key factor in the reversal of 35 reported obscenity convictions.[94] The Supreme Court has used *Redrup* in reversing state obscenity law convictions in Indiana, Ohio, Tennessee, Georgia, Kansas, New York, California, Alabama, Florida and Louisiana;[95] in addition, federal courts have used *Redrup* to overturn convictions in at least eight federal prosecutions;[96] finally, state courts in California, New Jersey, Illinois, Ohio, Michigan, Missouri, and New York have upset local obscenity convictions by using this 1967 per curiam decision.[97]

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92. 383 U.S. 502, 514 (1966).

93. 383 U.S. at 482-83.

94. Cases cited notes 95-97 *infra*.

95. Stanley v. Georgia, 394 U.S. 557 (1969); Ginsberg v. New York, 390 U.S. 629 (1968); Henry v. Louisiana, 392 U.S. 655 (1968); Felton v. Pensacola, 390 U.S. 340 (1968); Robert—Arthur Management Corp. v. Tennessee *ex rel.* Canale, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Corner v. Hammond, 389 U.S. 48 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Books v. Kansas, 388 U.S. 452 (1967); Avansino v. New York, 388 U.S. 446 (1967); Shepard v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967). *See also* Culbertson v. California, 385 F.2d 209 (9th Cir. 1967).

96. Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Aday v. United States, 388 U.S. 447 (1967); Luros v. United States, 389 F.2d 200 (8th Cir. 1968); Grant v. United States, 380 F.2d 748 (9th Cir. 1967); United States v. 127,295 Copies of Magazines, 295 F. Supp. 1186 (D. Md. 1968); United States v. 4,400 Copies of Magazines, 276 F. Supp. 902 (D. Md. 1967).

97. People v. Bonanza Printing Co., 271 A.C.A. 726, 76 Cal. Rptr. 379 (Super. Ct. App. Dep't 1969); State v. Romaine, 38 Ill. 2d 329, 231 N.E.2d 413 (1967); People v. Zerilli, 14 Mich. App. 513, 165 N.W.2d 619 (Ct. App. 1968); Olsen v. Doerfler, 14 Mich. App. 428, 165 N.W.2d 648 (Ct. App. 1968); State v. Smith, 422 S.W.2d 50 (Mo. 1967); G.P. Putnam's Sons v. Calissi, 50 N.J. 397, 235 A.2d 893 (1967); State v. Baird, 50 N.J. 376, 235 A.2d 673 (1967); People v. Stabile, 58 Misc. 2d 905, 296 N.Y.S.2d 815

Despite the ambiguity of the *Redrup* decision, the case seems to indicate that the Supreme Court may well be moving toward Justice Stewart's definition of obscenity, and thus be drawing a new line that is more congenial to the circulation of literature; perhaps it is hard-core pornography, and hard-core pornography alone, to paraphrase Justice Stewart, that government may constitutionally suppress.[98]

Much more important, however, the Court's stress in *Redrup* on the conduct of the defendant rather than on the nature of the material indicates that it may finally be heeding the warning given by Chief Justice Warren, ten years earlier in *Roth* that "[i]t is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture."[99] By making conduct of the defendant the central issue in many obscenity cases, the Court is to some extent relieving itself of its unenviable censorial chores as the "High Court of Obscenity."

The *Redrup* decision suggests that unless the suspect material meets a rigorous definition of hard-core pornography, or unless the defendant has conducted himself in a clearly defined proscribed manner, the first amendment bars any conviction for obscenity. For those who lament because the law has arrived at such a conclusion,[100] perhaps the words of Judge Bettman of Ohio may prove instructive:

> [I]t must be reiterated that in a democratic society, except in prohibition of clearly definable acts of aggression by one member of society against another, the law cannot enforce morality, however desirable such an aim might be. The burden of teaching man to choose the good and reject the evil must rest as it traditionally has on the family, the school and the church.[101]

(N.Y. Crim. Ct. 1969); State v. J.L. Marshall News Co., 13 Ohio Misc. 60, 232 N.E.2d 435 (C.P. 1967).

98. *See* Ginzburg v. United States, 383 U.S. 463, 499 (1966) (dissenting opinion).

99. Roth v. United States, 354 U.S. 476, 495 (1957) (concurring opinion).

100. The late Justice Musmanno of the Pennsylvania Supreme Court, perhaps one of the most outspoken critics of the United States Supreme Court's obscenity decisions, was profoundly irritated by the *Redrup* decision. He was especially hostile to the Supreme Court's use of *Redrup* in obscenity memorandum decisions in which the only justification given by the Court was the bare, bold citation of *Redrup v. New York.* Musmanno declared: "The reason so many Justices gave no reason for their decisions is that there is no reason to the decisions. . . . [T]he Supreme Court . . . has failed to live up to its solemn responsibility . . . ." Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 231, 233 A.2d 840, 862 (1967) (dissenting opinion).

101. State v. J.L. Marshall News Co., 13 Ohio Misc. 60, 62, 232 N.E.2d 435, 437 (C.P. 1967).